

No. 12137

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ADRIANO LLANOS SENARILLOS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S OPENING BRIEF.

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## APPELLANT'S OPENING BRIEF.

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*To the Honorable United States Court of Appeals for the  
Ninth Circuit of the United States of America:*

This is an appeal from the District Court of the United States, in and for the Southern District of California, Central Division, on a conviction of appellant and a judgment of the Court thereon under an indictment for perjury.

### **Jurisdiction.**

This appeal is taken from a judgment and sentence pronounced in the District Court of the United States, in and for the Southern District of California, Central Division, on the 20th day of December, 1948, which judgment

was based upon a verdict of guilty upon an information which was filed in said Court on October 6, 1948, the said appellant having been charged with violating the provisions of the U. S. C., Title 8, Section 152—False Statement in Immigration Matters [Tr. of R. p. 2]. Appellant pleaded not guilty and the cause was set for trial on November 23rd, 1948 [Tr. of R. pp. 3-4]. Subsequently, on November 26th, 1948, the above cause came on for trial and the appellant was found guilty of the offense alleged in the indictment [Tr. of R. p. 5] and on the 20th day of December, 1948, defendant was sentenced [Tr. of R. p. 7]. Subsequently, and in due course a notice of appeal was filed and the appeal perfected [Tr. of R. pp. 8, 9, 10, 11, 12, 13].

### **Statement of the Case.**

Appellant in substance was charged with the offense of making a false statement in a matter affecting the right of the appellant to remain in the United States before Lewis A. Denny, a duly appointed immigration inspector of the Immigration and Naturalization Service of the United States Department of Justice, in that he made a statement while under oath that he had never resided in the United States prior to 1945; that he had never been deported from the United States, and that he had never been convicted of a crime, whereas in truth and in fact, as he then and there well knew, he had resided in the United States prior to 1945, had been deported from the United States in 1940, and had been convicted of the crime

of petty theft in 1935 and of the crime of first degree burglary in 1947.

During the entire course of appellant's trial, he in no way contradicted, either directly or indirectly, that the above facts were not true, freely and openly admitted that he had once been convicted of a felony, once of a misdemeanor and had been deported. The proceedings on which the indictment is based were held before Lewis A. Denny, who it is conceded was a duly and regularly appointed and qualified officer of the Immigration and Naturalization Service and one who is empowered to administer oaths. In the proceedings before Mr. Denny, appellant at first denied the truth of the above facts but within a period of minutes admitted that the above facts were true.

### **Statement of Questions Involved.**

1. The fact that appellant in his testimony before the Immigration Inspector recanted certain statements and testimony in the same proceeding during the same session within a period of minutes and by recanting such testimony did not constitute perjury.

### **Specifications of Assigned Errors Relied On.**

The evidence against appellant is manifestly insufficient to support the verdict of the Court and judgment entered thereon and such verdict and judgment are contrary to the law and the evidence.



## ARGUMENT.

### Specification of Error No. 1.

It will undoubtedly be conceded by the respondent that the alleged perjurious testimony of the appellant was immediately recanted by him within a few minutes after it was given and during the same proceedings on the same day, date, and place, as the following references to the Transcript of the Record will show:

(Testimony of Lewis A. Denny):

“Q. Did you ask him to examine particularly any of the other items on the form? A. Let me say, I asked him to examine the form carefully, all items, and then state whether he wanted to make any changes, particularly with reference to his address, his employment and arrests, and directed his attention particularly to the Item No. 24 on Exhibit No. 2.

“The Court: This Item No. 24 and the whole form was in the same condition, that is, as to the blanks being filled out, as it is now?

The Witness: It is.

The Court: At the time you submitted it to him?

The Witness: Yes.

The Court: What date was that?

The Witness: On the 20th of April, sir. [14]

By Mrs. Bulgrin:

Q. That particular paper was offered in evidence, was it, in that hearing? A. It was made Exhibit No. 2 with the record of the immigration hearing.

Q. Do you recall, Mr. Denny, that any testimony was given, any direct testimony was given, by Adraino Llanos as the result of your questioning in regard to his prior residence in the United States? A. There was. I asked him if he had been in the United States before.



Q. What did he say? A. He said he had not.

Q. Was there any direct testimony in regard to his record, his prior criminal record? A. I asked him if he had ever been arrested and convicted of any crimes, either here, in the Philippine Islands or elsewhere, and he said no.

Q. Was there any testimony, any direct testimony, in regard to his prior deportation from the United States, if any? A. I asked him if he had ever been arrested.

The Court: Is this in this transcript?

The Witness: Yes.

Mrs. Bulgrin: Yes. [15]

The Witness: I asked him if he had been arrested.

Mr. Kolts: The transcript would be the best evidence.

The Court: Objection sustained.

Mrs. Bulgrin: It hasn't been offered in evidence.

The Court: Calling your attention to Exhibit 1 for identification, have you examined that since it was transcribed?

The Witness: I have, sir.

The Court: Does that correctly state the questions you asked and the answers which were given?

The Witness: It was.

The Court: Upon that occasion?

The Witness: Yes, your Honor.

Mrs. Bulgrin: At this time, your Honor, I would like to offer the copy into evidence.

The Court: Exhibit No. 1?

Mrs. Bulgrin: Exhibit No. 1.

The Court: In its entirety?

Mrs. Bulgrin: Yes, your Honor.

The Court: Admitted.

(The document referred to was marked Government's Exhibit No. 1 and received in evidence.) [Tr. of R. pp. 19, 20.]

[Testimony of Lewis A. Denny, Tr. of R. pp. 23-27]:

*"Cross-Examination"*

By Mr. Kolts:

Q. Mr. Denny, did you have any conversation with the defendant on this day of April 20th which was not placed in the record? A. No, not during the time of the hearing; not at all.

Q. Well, shortly prior to or at the conclusion of the hearing? A. I probably did tell him that I wouldn't hear the testimony of his wife that afternoon because I had introduced three additional charges against him and asked him if he wanted to be represented by counsel.

Q. Just before the conclusion of this particular hearing he admitted to you the fact that he had been deported, did he not? [19] A. He did, when I showed him the report of the Federal Bureau of Investigation. He stated that that record related to him.

Q. And he also admitted to you the fact that he had been previously convicted, I believe it was in the city of Portland? A. He did.

Q. He admitted to you that he had been convicted in the state courts of the state of California, did he not? A. He did.

Q. Did he give you any reason for the previous statement that he had made to you? A. I didn't ask him for that, except to this extent, I asked him if that record related to him, and I think

the transcript contains his statement, 'Yes, it does, but don't tell my wife, she would spring a fit.'

Q. That is correct.

The Court: Just a minute now. The transcript here which is Exhibit No. 1?

The Witness: Yes, sir.

The Court: Do you know what page that is on?

The Witness: I think it is down about page 10.

Mr. Kolts: I believe you will find that question on page 10, the last two questions.

The Witness: Yes. [20]

By Mr. Kolts:

Q. Did he tell you at any time how he happened to come to this country the second time after he had been deported? A. Yes. I questioned him very carefully about that, and as I remember he told me that he had been evacuated here by the Army from the Philippine Islands because of the fact he had an American citizen wife.

Q. Did he tell what conversation he had with the immigration inspectors in Hawaii? A. Yes, he did.

Q. What did he tell you about that? A. He told me that he had told them he had never lived in the United States before, that he was the husband of an American citizen wife.

Q. Did he tell you why he made that statement to them in Hawaii? A. That I can't recall.

Mrs. Bulgrin: Your Honor, I would like to object to that question. I believe it is immaterial.

The Court: Objection overruled. He said he cannot recall.

By Mr. Kolts:

Q. Did he tell you at any time, Mr. Denny, why he had made these various statements which were un-

true? [21] A. I believe the record shows that he said that he didn't want his wife to know about his past record; yes.

The Court: You mean your record shows that?

The Witness: I am sure it does.

The Court: You mean this record?

The Witness: Exhibit No. 1 shows that.

By Mr. Kolts:

Q. Now in any conversation you had with him on that day, either on the record or off the record, did he tell you that while he was in the Philippines he had been a member of the guerrillas?

Mrs. Bulgrin: Your Honor, I think that is highly incompetent, irrelevant and immaterial, and I think it is objectionable because it does not go to the heart of this charge. The fact that he was in the guerrilla forces is immaterial to the fact that he allegedly committed perjury and would offer no excuse for his perjured statement.

The Court: I suppose it goes to the intent, criminal intent. The objection is overruled.

The Witness: He did say something to the effect that at one time or another during the occupation that he had been associated with or part of the guerrilla forces in the Philippine Islands; yes.

By Mr. Kolts:

Q. Did he further tell you that at the time he and [22] his wife, his children, arrived in Hawaii that the fighting was going on in the Philippines? A. Now that I can't tell you, sir. I don't recall that I asked a question along that line.

Q. Do you recall his telling you that the reason that he misrepresented the facts to the Immigration Service in Hawaii was because he was afraid if he told the truth— A. That is right, I recall.

Q. —that they would ship him and his wife and two children back to the Philippines and he might be killed? A. I recall him saying that; yes.

Q. He made that statement? A. He did make that statement.

Q. At the time of this hearing he was not represented by counsel, was he? A. He was advised of his right and waived the right to be represented by counsel on the first occasion.

Q. But subsequently he was represented by counsel? A. Later he was represented by Mr. Finch; yes.

Mr. Kolts: That is all. Thank you.

The Court: Step down.

(Witness excused.) [23]

\* \* \* \* \*

ADRIANO SENARILLOS-LLANOS

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows: [29]

The Clerk: Will you state your full, true and correct name?

The Witness: Adriano Senarillos-Llanos.

The Clerk: Your address?

The Witness: 800 East Edgeware Road.

The Clerk: Take the stand.

*Direct Examination*

By Mr. Kolts:

Q. You are the defendant, Mr. Llanos? A. Yes, sir.

Q. And you saw the record of a certain crime of which you were convicted in the city of Portland, Oregon, is that true? A. Yes, sir.

Q. You were also convicted of a felony and sentenced to San Quentin Penitentiary in the state of California, is that true? A. Yes, sir.

Q. And you were subsequently deported to the Philippine Islands? A. Yes, sir.

Q. Now what did you do after you arrived in the Philippine Islands? A. I was working in a big company there buying and selling, and in 1940 I got married. [30]

Q. And you are still living with your wife? A. Yes, sir.

Q. Who was an American citizen? A. Yes, sir.

Q. Do you have any children? A. Yes, sir.

Q. How many of them? A. Two.

Q. Now what, if anything, did you do when the war broke out? A. Well, when the war broke out I joined the Filipino-American guerrillas in the Philippines.

Q. How long did you serve with them? A. Until the Americans came to the Philippines.

Q. On what date did you leave the Philippine Islands? A. That was in May.

Q. May of what year? A. 1945.

Q. Before you left were you examined by any immigration officials? A. Yes, I was examined right there in Manila by the American Army Consul.

Q. Was there fighting going on in the Philippines at that time? A. Yes, sir. [31]

Q. What was your reason for desiring to leave the Philippines? A. You see, I was afraid that my wife and my two children would get killed by the Japanese.

Q. You were again examined by the immigration officials upon your arrival in Hawaii, were you not? A. Yes, sir.



Q. What did you tell them, if anything, about your past history? A. Well, I denied everything there in Hawaii.

Q. What was your reason for making that denial there? A. Well, you see, I was afraid that if they knew it they will send us back to the Philippines.

Q. Your wife and your two children included? A. My wife and two children.

Q. Were you again examined in San Francisco by the immigration officials? A. Yes, sir.

Q. What did you tell them in San Francisco? A. Well, I denied it in San Francisco.

Q. Then do you recall being examined by Mr. Denny? A. Yes, sir.

Q. And at first you denied the facts of your two prior convictions and your deportation from this country to Mr. Denny, didn't you? [32] A. Yes, sir.

Q. But subsequently in the same hearing you admitted that you had not told them the truth and that those things were true? A. Yes, sir.

Q. Now what other conversation did you have with Mr. Denny concerning your making those statements? A. I told Mr. Denny—well, in the first place, I denied it, and the last time that I talked with Mr. Denny I told him the truth.

Q. Did you tell Mr. Denny why you were then telling the truth? A. I told Mr. Denny that I told the truth because I—I forget now.

Q. Do you recall what you told him in that regard? A. Yes, I told Mr. Denny that the reason why I told, why I denied it, was because I was afraid that they would send my wife and children back to the Philippines.

Q. Did you have any other conversation with Mr. Denny along that subject? A. Yes.



Q. Just tell us what you said to him and what he said to you. A. Well, I don't remember now. I talked to Mr. Denny about—I don't remember now. [33]

Q. Did you relate to Mr. Denny in substance the same thing that you have testified to here? A. Yes, sir.

Mr. Kolts: Thank you. You may cross-examine.

*Cross-Examination*

By Mrs. Bulgrin:

Q. Mr. Llanos, you say you were a member of the Philippine guerrillas? A. Yes, sir.

Q. How long were you so engaged? A. About two years and a half.

Q. What were the dates involved? A. Well, I could not recall now but I have the papers in the house. It is 1943 or something.

Q. To 1945? A. 1945.

Q. To your best knowledge, can you give an estimate of how many of your people were so engaged in guerrilla activities at that time? A. Well, so many I could not recall.

Q. Would you say that most of your people over there were engaged in guerrilla action? A. Not most of them.

Q. A great number of them were engaged in guerrilla activities? [34] A. Yes, ma'am.

Q. Well, in May, 1945, Mr. Llanos, were the Japanese still on the Philippine Islands? A. Yes, ma'am.

Q. Were there a great number of them left? A. Yes, ma'am. Heavy fighting was still going on when I left.

Q. Up in the hills or what? A. Right in the city.

Q. Right in the city? A. Yes, ma'am.

Q. That was in 1945? A. 1945.

Q. What else did you do during the time you were in the guerrillas, Mr. Llanos? A. Fight against the Japanese.

Q. Was that a full-time occupation or is that something you carried on as a sideline? A. Well, that was during our war time.

Q. You say you worked for a big company over there? A. Yes, ma'am; that was 1940.

Q. In 1940? A. Yes.

Q. Did you terminate your work there or did you continue working in this company? [35] A. No, ma'am.

Q. You ended your work there? A. Yes, ma'am.

Q. You stopped working there? A. Stopped working.

Q. Mr. Llanos, you were examined sometime in May, 1945, by the American Army, by the Army authorities, on the Philippine Islands, is that right? A. That is right.

Q. In regard to your going back to the United States? A. Yes, ma'am.

Q. The American forces were occupying that region at the time, were they not? A. Some part, some parts not.

Q. Were they occupying the region in which you lived, your wife and children lived? A. No, they didn't at that time.

Q. Was there any possibility of your wife and children moving to a region which was protected by the Army authorities? A. No.

Q. You say, Mr. Llanos, that you were examined in San Francisco and you again denied your prior record, is that right? A. Yes, ma'am. [36]

Q. And that you denied it again before Inspector Denny? A. Yes, ma'am.

Q. And the time you made your first denial, Mr. Llanos, did you have two children? A. Yes, ma'am.

Q. How old were they? A. The oldest one is six and the other one is—no, I make a mistake. What was the question, please?

The Court: Did you have two children, and how old were they—when, counsel?

Mrs. Bulgrin: In 1945.

The Witness: I only have one in 1945.

By Mrs. Bulgrin:

Q. You only had one child in 1945? A. Yes.

Q. What city did you live in? A. Manila.

Q. In Manila? A. Right in Manila.

Q. And you say there was fighting in Manila?  
A. That is right.

Q. Between the Japanese and the Americans? A.  
Yes, ma'am.

Mrs. Bulgrin: That will be all.

Mr. Kolts: Nothing further. [37]

The Court: Step down.

(Witness excused.) [Tr. of R. pp. 23-33.]

[Excerpts from Government's Exhibit No. 1]:

"Q. Did you go to an American Consul and get a visa? A. No, I didn't.

Q. Have you ever been legally admitted to the United States on presentation of an immigration visa?

A. No.

Q. Have you ever paid a head tax to be legally admitted to the United States for permanent residence? A. I paid \$8.00. I don't know if that was head tax.

Q. When was that? A. In May, 1945, I paid \$8.00, I think it was alien tax.

Q. Have you ever been refused admission to the United States? A. No.

Q. Did you ever try to come in and have the Officers send you back? A. No.

Q. Exhibit No. 4 is Form I-404, Certificate of Admission of Alien, recording your arrival and admission at San Francisco from the "Monterey" on May 26, 1945, at which time you were accompanied by your wife and son, indicates that you were admitted then for a visit of one year. Is that right? A. Yes.

Q. And after that you shipped out on the "Admiral Capps"? A. No, first it was the "Buchanan."

Q. And then? A. I stayed here and then I got a notice I had to ship out.

Q. Where? A. I got a notice I had to go out of the country, at San Francisco.

Q. Then what? A. That is why I joined the "Admiral Capps." I thought the boat would go to the Philippine Islands.

Q. Now, Exhibit No. 4, which we have identified previously, showing you to have arrived in San Francisco in May of 1945, indicates that you had never before lived in the United States. Is that right? A. Yes.

Q. You never lived here? A. No.

Q. Have you ever been arrested and deported out of the United States? A. No.

Q. Have you ever been arrested and convicted of any crimes either here or in the Philippine Islands, or elsewhere? A. No.

Q. Do you recall shortly after you first came to the United States in 1945, and to be exact, on September 11, 1946, you made a statement before Inspector Young in this office? A. I think so.

Q. I show you the original of the statement made on September 11, 1946, in Los Angeles by Adriano Llanos-Sinarillos, and ask you to read that and state

if that is true and correct? Statement read by respondent and returned to the Presiding Inspector.)

A. Yes, sir.

Q. A copy of the transcript of the sworn statement which you have made and acknowledged as being correct, dated September 11, 1946, is made a part of the record in your hearing and marked Exhibit 14. Any objection? A. No.

Q. Now you recall on that occasion when asked 'Have you registered under the Alien Registration Act of 1940' and you said, 'Yes, my Alien Registration Receipt Card number is 6299053'; will you compare that number with the number on the alien receipt card you have shown here this morning? A. No. 6299053.

Q. When did you register under the Act of 1940? A. Shortly after I came here.

Q. Do you recall you were then fingerprinted on that occasion? A. Yes, sir.

Q. Do you recall on February 10th of this year when I served you with the Warrant of Arrest you were also fingerprinted? A. Yes.

Q. I show you at this time, and asked you to examine Form T-2 of the Federal Bureau of Investigation, dated February 19, 1948, relating to one Eddie Sinarillos, Adrian Llanos, Adrian S. Llanos, Adie Lanos Sikirillos, and other names, and then state if that is your record? (Respondent examines Form T-2 and then returns it to Presiding Inspector.) A. Yes, that is my record. But please don't tell my wife because she would spring a fit.

Q. Now this record indicates that in 1932 at Los Angeles, California, you were placed on probation on the charge of Burglary. Is that correct? A. Correct, but—



Q. The record also indicates that you have been convicted on several occasions, once in Portland, Oregon, and again in Los Angeles— A. In Seattle, Washington, I was never convicted there, it was the other fellow.

Q. Now, I show you, at this time, a complaint filed in the Municipal Court of the State of Oregon for the City of Portland, County of Multnomah, on the 22nd day of March in the year 1935, wherein it is charged that one Adrian Llanos and Eddie Burges on the 15th day of March in 1935, in the City of Portland, County of Multnomah, State of Oregon, then and there being, did then and there unlawfully take, steal and carry away certain personal property, to-wit: 3 Japanese Kimonos, 3 sashes, 1 ladies fur coat of a value of \$34.00, the property of Roy Akiyama, and a Judgment in the related file, dated the 22nd day of March, 1935, on a plea of guilty to the charge of Petit Larceny, sentenced to serve 365 days in a Multnomah Jail, and ask you to examine that record and then state whether that relates to you. (Record examined by respondent and returned to Presiding Inspector.) A. That is right.

Q. How did you plead to that offense in Portland in 1935, guilty or not guilty? A. The other fellow pleaded guilty, so I had to also.

Q. You did plea guilty? A. Yes.

Q. Were you guilty? A. I was not guilty of the case, but I pleaded guilty.

By Presiding Inspector:

A certified copy of the Judgment, dated the 22nd day of March, 1935, will be made a part of the record of your hearing and marked as Exhibit 15, together with a copy of a transmittal letter dated March 31, 1948, signed D. W. Tomlinson, Officer in Charge, Portland, explaining the absence of the copy of com-

plaint at the present time, but inasmuch as original certified copy of the complaint filed on the 22nd day of March, 1935, is included in the record of a prior hearing contained in file A-6299053, it is included in your record of hearing by reference.

Copy of T-2, which you have examined and state relates to you, will be made a part of the record of hearing in your case and marked Exhibit 16.

Presiding Inspector to Respondent:

Q. You were also convicted in the city of Los Angeles, were you not? A. Yes, sir.

Q. In what year was that? A. In 1937.

Q. Were you charged with Burglary? A. Yes.

Q. I show you at this time a certified photostatic copy of an Information filed in the Superior Court of the State of California, County of Los Angeles, No. 68462 in an action styled The People of the State of California, Plaintiff vs. Adrian Llanos, Defendant, on the 22nd day of June, 1937, charging the defendant Adrian Llanos with the crime of Burglary, a felony, in that on the 7th day of June, 1937, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously enter the house and building occupied by one Mrs. Lily White, in the City of Los Angeles, County and State aforesaid, with the intent then and there and therein to unlawfully and feloniously commit theft, and a Judgment of Court entered on the 21st day of July, 1937, wherein it is shown that Adrian Llanos, having pleaded guilty to the offense of Burglary, a felony, as charged in the Information, be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law, which I ask you to examine and then state whether that record relates to you. (These documents examined by respondent and returned to the Presiding Inspector.) A. Yes.



Q. How did you plead to that offense? A. Because I had to plead guilty, I was advised to do so by the attorney, he told me to.

Q. Did you plead guilty? A. Yes.

Q. Were you guilty? A. So far as I know I was an accomplice.

Q. Did you enter the house of Mrs. Lily White? A. It was the other boy, but I was the one picked up.

Q. Where were you picked up? A. Right near the house.

Q. Were you in the house or out of it? A. Right in the Court.

By Presiding Inspector:

Now a copy of the certified photostatic copy of Court Record, which you have examined and state relates to you, is made a part of the record of your hearing, and marked Exhibit 17.

Presiding Inspector to Respondent:

Q. An examination of Exhibit 16, indicates that in 1937, after having been convicted you were imprisoned at San Quentin. Is that right? A. Yes, sir.

Q. That imprisonment was a term fixed for 15 years, or five years to life, is that right, that is, the statutory term was 5 years to life, and was fixed for 15 years for the Parole Board. A. I got out in less than five years.

Q. How were you released from San Quentin? A. I was paroled to the Philippines.

Q. As a matter of fact you were paroled to the Immigration Service for deportation, were you not? A. Yes.

Q. And you were deported? A. Yes.

Q. Were you accorded a hearing by Immigration Officers while confined at San Quentin? A. Yes, I had a hearing.

Q. And it was after that hearing you were taken from San Quentin and placed aboard a ship and removed from the United States by the Immigration Service? A. Yes.

Q. Do you recall when you were taken from San Quentin and placed aboard the ship? A. Yes, that was on the 'President Coolidge.'

Q. In what year was that? A. In 1940.

Q. I show you at this time the Warrant of Deportation issued on the 29th day of August, 1938, on Central Office File No. 55972/550, San Francisco number 12020/28134, wherein it is directed that Adrian Llanos or Adriana Llano or Adrian Llanos who entered the United States at Astoria, Oregon, on the SS. 'West Hixton' on the 4th day of September, 1926, is subject to deportation under Section 19 of the Immigration Act of February 5, 1917, being subject thereto under the following provisions of law, to wit: The Act of 1917, in that he had been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the commission subsequent to entry of a crime involving moral turpitude, to wit: Petit Larceny; and Burglary, first degree. Executed on the reverse to show "Executed February 14, 1940, ex. SS. 'President Coolidge,' signed William A. Motter, Guard, Deported to Manila, P. I.," and ask you to examine this record and then state if that record relates to you and if that is the charge on which you were deported. (Respondent examines the record and returns it to the Presiding Inspector.) A. Yes.

By Presiding Inspector:

A true copy of the Warrant of Deportation which has been identified and shown to have been executed, will be made a part of your record of hearing, and marked Exhibit 18.

Presiding Inspector to Respondent:

Q. Now, as I understand from the record, a hearing was held at San Quentin while you were confined there, is that right? A. Yes. \* \* \*”

As stated before, the primary question involved is whether or not a recantation in the same proceedings before the same Tribunal at approximately the same time constitutes perjury.

In the case of *United States v. Norris*, 300 U. S. 564, at page 576, the Supreme Court of the United States in an opinion written by Mr. Justice Roberts stated as follows:

“As will appear by scrutiny of the cases cited in Note No. 1, the laws of the Federal Courts have not dealt with the question often and, while their opinions may not be entirely consonant, it may be said that they preponderate against the respondent’s contention.”

The facts in the case of *United States v. Norris, supra*, can be distinguished from those in the within case in that in the *Norris* case the appellant testified before the Grand Jury on one day and recanted his testimony on the next day. His conviction was affirmed by the Supreme Court.

The only cases which support the *Norris* decision are the cases of *United States v. Hirsch*, 136 F. 2d 976 (1943), which case can be distinguished by reason of the fact that the testimony alleged to be perjurious was given on June 12, 1942 and recantation took place on October 2, 1942. The case of *In re Schnable*, 61 Fed. Supp. 386 (1945), is not in point inasmuch as the only question involved was whether or not there was a fraud perpetrated in an application in a bankruptcy hearing.

In this case the perjurious statements were made on August 8, 1944 and a recantation was made on September 21, 1944. From a perusal of the above authorities, it is readily seen that in each decision the Court was not confronted with an immediate retraction but in each case there was a material difference of time between the making of the alleged perjurious statement and the recantation.

The case of *People v. Gillette*, 126 App. Div. 665, 111 N. Y. Supp. 133, states as follows:

“Immediately thereafter and without leaving the witness stand, he stated that he had received from time to time from certain officers of the Insurance Company . . .”

Mr. Justice McLaughlin speaking for the Court, stated as follows:

“But I do not choose to rest my conclusion on this ground alone. Even if it assumed that the answers were false and made with the intention of misleading or deceiving, an indictment for perjury could not be predicated thereon, inasmuch as immediately thereafter he fully explained the nature of the account and the source from which the fund came.

“A judicial investigation or trial has for its sole object the ascertainment of the truth that justice may be done. It holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not. This inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury.”

This is the nearest case in factual points that counsel have been able to find.

The above case was noted and approved but the Court, after an analysis of the facts, found that the cases were not similar.

The law encourages the correction of an erroneous and even intentionally false statement on the part of a witness and perjury will not be predicated on such statements when the witness, *before the submission of the case fully corrects his testimony.*

*People v. Brill*, 100 Misc. Rep. 92, 165 N. Y. Supp. 65.

Wherefore appellant prays for reversal of the judgment, with instructions to the trial court to acquit said appellant.

Respectfully submitted,

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